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WILEY, REIN & FIELDING

1776 K STREET, N.W.  
WASHINGTON, D.C. 20006  
(202) 429-7000

WRITER'S DIRECT DIAL NUMBER  
(202) 429-7010

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FACSIMILE  
(202) 828-4969

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William E. Kennard  
General Counsel  
Federal Communications Commission  
1919 M Street, NW  
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Re: Docket 95-91, Satellite DARS Rules Effective Date

Dear Mr. Kennard:

On May 18, 1990, Satellite CD Radio, Inc. ("CD Radio") filed an application to launch and operate two spacecraft in the satellite digital audio radio service ("DARS"). Since that filing, CD Radio has repeatedly pressed for Commission decision on final service rules and licensing. CD Radio has urged the most rapid possible implementation of the new rules governing satellite DARS. In particular, should the Commission determine to award licenses by auction, CD Radio favors scheduling that auction as rapidly as possible.

The Contract With America Act of 1996 is no obstacle to this goal. Although Section 801 of that Act normally directs that agencies permit major rules to become effective sixty days after publication in the Federal Register and transmission to Congress (Section 801(a)(3)), the Act also provides an exception. Specifically, Section 808(2) of the Act permits agencies to dispense with this period "for good cause."

The promulgation of satellite DARS licensing rules meet any reasonable definition of good cause. (CD Radio is not seeking waiver of the 60 day period for *Congressional* disapproval of major rules, which begins only after rules become effective.)

First, action in this rulemaking is long overdue. CD Radio's application has been on file for *nearly seven years*. Applications in the service were cut-off over four years ago. The spectrum allocation was finalized two years ago. The FCC long ago found that the public interest would be served by the availability of digital audio radio services. The American public should not be denied this valuable service any longer.

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Second, a sixty day delay in the effective date of the rules would work manifest injustice to existing satellite DARS applicants. The Commission is required by statute to auction spectrum in the new "WCS" service on or before April 15, 1997. The Commission has proposed to permit that spectrum, which is adjacent to that planned for satellite DARS, to be used for DARS service. Failure to hold the satellite DARS auction as rapidly as possible by advancing the effective date of the rules could result in the WCS auction being held *before* the satellite DARS auction. This would permit other entities not even yet on file to receive licenses before CD Radio, which has been waiting nearly 7 years. Indeed, simple fairness suggests that the FCC should conduct any satellite DARS auction as much in advance of the WCS auction as possible.

Third, a waiver of the sixty day effective date of the rules would not imperil subsequent legal examination of the docket. This is because the Contract with America Act specifies that agency decisions made thereunder – including decisions under 808(2) to advance the effective date of major rules – are not subject to judicial review, under Section 805.

Finally, Congress – individual members of the relevant oversight Committees in the House and Senate – have expressed a strong desire to expedite auctions whenever possible. This includes the specific circumstance of a satellite DARS auction. Indeed, I note that the Commission's most recent "legislative package" submitted to Congress called for change in the statute to permit advancing the effective date of new rules. In discussing that package, you were quoted as believing that "auctions should not be subject to the act." We agree. However, the Commission need not await new legislation; the current Act already permits agencies, particularly independent agencies, to establish a more rapid effective date for major rules.

The long delay between application and auction has been difficult for CD Radio and other entities interested in offering service to the public. The existing applicants have had to fund operations without service revenues, and without even licenses. Any additional delay could impair the continued existence of these companies, potentially resulting in fewer innovative offerings to the listening audience.

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For the foregoing reasons, the Commission has "good cause" under Section 808(2) to permit the satellite DARS rules become effective upon publication in the Federal Register.

Very truly yours,

A handwritten signature in black ink that reads "Richard E. Wiley". The signature is written in a cursive style with a long horizontal stroke at the beginning.

Richard E. Wiley  
Counsel for CD Radio

cc: Don Gips, IB  
John Stern, IB  
Peter Tenhula, GC